Office - Supreme Court, U.S.
FILED
AUG 15 1984
ALEXANDER L. STEVAS,
CLERK

84-281

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1984

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Petitioners,

vs.

ITT CONSUMER FINANCE CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LARRY W. RADER
Attorney For Petitioners
P.O. Box 684
Wausau, WI 54401
1-715-845-4278

The Scheffer Press, Inc.—(312) 263-6850

HQ RAD

QUESTIONS PRESENTED

(1) Does the complaint allege a claim for relief under 42 U.S.C. Sec. 1983 because the wrongful conduct of the ITT attorneys denied the petitioners their Constitutional right to a meaningful and fair hearing on the loss of their $300,000.00 secured potato crop where the ITT attorneys were allowed to proceed by the trial judge notwithstanding the conflict of interest and the violation of the Wisconsin Supreme Court Rules of Professional Responsibility and ABA Canons of Ethics?

(2) Does the complaint allege a conspiracy or joint action where the judge allowed said ITT attorneys to defend their own work product when he was aware of the conflict of interest and failed to exercise his mandatory duty to remove said attorneys before substantial rights of the petitioners were affected?

TABLE OF CONTENTS

	PAGE
Questions presented	i
Petition	1
Decision Below	2
Jurisdiction of the Court	2
Applicable statutes	2
Statement of case	5
Reasons for granting Writ of Certiorari	6

SUMMARY OF PETITION

The COMPLAINT, alleges wrongful conduct of the trial court and ITT and its ATTORNEYS, Whyte & Hirschboeck, (which law firm drafted a 1979 loan security crop agreement and advised Schulist and ITT that it covered future crops, and which law firm also billed Schulist $1000.00 for its services) who appeared for ITT and ADMITTED in its answer that the crop was secured in a 1981 damage suit by Schulist (claiming that ITT left their secured 1980 $300,000.00 potato crop rot and did not sell the same as required by law in the ITT 1980 foreclosure proceeding) and then the ITT attorneys moved for summary judgment on the ground that the security agreement lacked a "legal" description of the real estate and was therefore unenforceable under Wis. Stat. 409.203(1) and consequently ITT was not responsible for the crop loss, WHEREIN the Trial Judge granted the motion notwithstanding the answer and *the conflict of interest of W & H* therein, contrary to the rules of summary judgment and The Wisconsin Supreme Court Rules of Attorneys Professional Responsibility and Canons of Ethics of The American Bar Association, STATES A CLAIM UNDER SEC. 1983 OF THE CIVIL RIGHTS ACT as petitioners were denied their right under the 14th amendment to a fair and meaningful hearing before being deprived of their property.

LIST OF AUTHORITIES CITED

Cases Cited

PAGE

Adickes v. *S.H. Kress & Co.* Supra, 398 U.S. at 152, 90 S. Ct. 1598 (1970). 7

Re Banks Or 584 P2d 284, 1 ALR 4th 1105 (1978) .. 9

Burgess v. *Miller* (D.C. Florida 1980) 492 F.Supp. 1284. 9

City of Whitewater v. *Baker,* 99 Wis. 2d 449, 299 N.W. 2d 584 (C.A. 1980). 9

Ennis v. *Ennis,* 88 Wis.2d 82, 276 N.W.2d 341 (1978 C.A.). 10

Florida Bar. v. *Teitelman* 261 So 2d 140, 68 ARL 3rd 959. 9

Lugar v. *Edmondson Oil Co. Inc.,* 102 S. Ct. 2744 (1982). 7

Mathews v. *Eldridge* 96 S. Ct. 893, 424 U.S. 333 (1976). 7

Mendelson v. *Blatz Brewing Co.* (1960), 9 Wis. (2d) 487, 101 N.W. (2d) 805. 12

Monroe v. *Pape* 365 U.S. 167, 81 S. Ct. 5 L.Ed.2d 492 (1961). 7

Murphy v. *Helena Rubinstein Company* 234 F.Supp. 893 (N.J. 1964). 9

Pulliam v. *Allen* 104 S. Ct. 1970 (1984). 7

United States General, Inc., v. *Schroeder,* 400 F.Supp. 713 (1975 E.D. Wis.). 11

Ex parte Virginia 100 U.S. 339, 25 L.Ed. 676 (1980). .. 7

Re Young (1919) 188 APP Div 338, 177 NYS 259 9

OTHER AUTHORITIES

PAGE

17 ALR 3d 835 9

68 ALR 3d 959 9

1 ALR 4th 1105 9

15A C.J.S. Conspiracy, Sec. 2 12

STATUTES

42 U.S.C. section 1983 .....2, 6, 7, 11, 12

Wisconsin Supreme Court Rules of Professional Responsibility (Said Rules correspond to the American Bar Association Canons of Ethics)

SCR 20.25 4

SCR 20.33 4

SCR 20.34 3

SCR 20.36 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No.

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Petitioners,

vs.

ITT CONSUMER FINANCE CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the decision of U.S. Court of Appeals for the Seventh Circuit, dated May 23, 1984, and the Judgment entered pursuant thereto affirming the dismissal of their complaint for failure to state a claim for relief under 42 U.S.C. Sec. 1983.

UNPUBLISHED OPINION

The decision of the U.S. Court of Appeals was not published and is set forth herein in the Appendix at page 3a. The complaint, as amended, is set forth in the Appendix at page 13a.

JURISDICTION OF THE COURT

This court has jurisdiction pursuant to 42 U.S.C. Sec. 1983, 28 U.S.C. Sec. 1343, and U.S.C. Sec. 1254(1) to review the decision of said U.S. Court of Appeals. This petition was timely filed

APPLICABLE STATUTES

42 U.S.C. Sec. 1983.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

WISCONSIN STATUTES:

SCR 20.36 (ABA, DR 7-102) Representing a client within the bounds of the law.

(1) In his or her representation of a client, a lawyer may not:

(a) File a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

• • •

(c) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

• • •

SCR 20.34 (ABA, Canon 7 and EC) A lawyer should represent a client zealously within the bounds of the law.

(1) Ethical consideration. (a) The duty of a lawyer, both to his or her client and to the legal system, is to represent his or her client zealously within the bounds of the law, which includes disciplinary responsibility of a lawyer drives from his or her membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his or her conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

• • •

SCR 20.33 (ABA, DR 6-102) Limiting liability to client.

A lawyer shall not attempt to exonerate himself or herself from or limit his or her liability to a client for malpractice.

SCR 20.25 (ABA, DR 5-102) Withdrawal as counsel when the lawyer becomes a witness.

(1) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or she or a lawyer in his or her firm ought to be called as a witness on behalf of his or her client, the lawyer shall withdraw from the conduct of the trial and the firm, if any, may not continue representation in the trial, except that the lawyer may continue the representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in the firm may testify in the circumstances enumerated in SCR 20.24(2)(a) to (d).

• • •

STATEMENT OF THE CASE

The Court of Appeals Decision and the attached Complaint set forth the conflict of interest of the ITT attorneys defending their work product in the Schulist claim for damages against ITT for failure to sell, and allowing to rot in the ground, their $300,000.00 1980 potato crop. Briefly stated, said attorneys drafted a security agreement and advised both ITT and Schulists that it secured the potato crop, and subsequently avoided liability on the ground that it was unenforceable because of lack of a legal description. The Court of Appeals stated that the conduct of said attorneys was a "mere impropriety" and that "mere knowledge" of said impropriety by said trial judge did not give rise to a section 1983 cause of action.

REASONS FOR GRANTING WRIT OF CERTIORARI

There are special important reasons under Supreme Court Rule 17.1 for the United States Supreme Court to grant certiorari as:

(1) The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by approving such a departure by the Wisconsin trial court in allowing the ITT attorneys to defend their own work product in violation of the Rules of Professional Responsibility as promulgated by both the Wisconsin Supreme Court and the American Bar Association in violation of petitioners right of due process to a fair hearing.

(2) The Court of Appeals has decided an important question of Federal Law under Sec. 1983 of the Civil Rights Act which should be settled by the Supreme Court, that is:

1. Is the wrongful conduct of the ITT attorneys a "mere impropriety" which did not deprive the petitioners of their Constitutional right to a "meaningful hearing"?
2. Is the "mere knowledge" by the trial judge of the attorney's conflict of interest over their work product which was the subject of the dispute make him a co-conspirator or joint participant under Sec. 1983?

(3) The Court of Appeals has decided an issue that goes to the heart of our adversary system of justice under the Constitution.

ARGUMENT

Due process does not distinguish between a deprivation of property by an unconstitutional statutory scheme or, an unconstitutional judicially proscribed procedure. *Monroe* v. *Pape* 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961), *Ex parte Virginia* 100 U.S. 339, 346-347, 25 L.Ed. 676 (1980). Where the state abuses its lawful authority, or exceeds lawful authority in the deprivation of property, there is a direct violation of the plaintiffs' Fourteenth Amendment due process rights. *Adickes* v. *S.H. Kress and Company* 90 S.Ct. 1598, 398 U.S. 144 (1970), *Lugar* v. *Edmondson Oil Co., Inc.* 102 S.Ct. 2744 (1982). Recently, in *Pulliam* v. *Allen* 104 S.Ct. 1970 (1984) the Supreme Court granted injunctive relief against a trial judge for imposing bail in violation of the individual's right of due process and equal protection and also awarded attorney fees pursuant to 42 U.S.C. Sec. 1983 and 1988. Unconstitutional practices by trial judges in civil cases also give rise to a claim for damages against the private individuals notwithstanding the judge is immune from such claim under Sec. 1983. *Sparks,* infra.

THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE REQUIRES A "MEANINGFUL HEARING" UTILIZING "FUNDAMENTAL FAIRNESS" BEFORE DEPRIVING A PERSON OF THEIR PROPERTY.

The Court in *Mathews* v. *Eldridge* 96 S. Ct. 893, 902, 424 U.S. 333 (1976) restated the rules applicable to due process determination, to wit:

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff* v. *McDonnell*

418 U.S. 439, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974). See, e.g. *Phillips* v. *Commissioner of Internal Revenue* 283 U.S. 589, 596-597, 51 S.Ct. 608, 611-612, 75 L.Ed. 1289 (1931). See also *Dent* v. *West Virginia* 129 U.S. 114, 124-125, 9 S.Ct. 231, 234, 32 L.Ed. 623 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Facist Comm.* v. *McGrath,* 341 U.S. 123, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J. concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner.: *Armstrong* v. *Manzo* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62 (1965). See *Grannis* v. *Ordean* 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914).

• • •

These decisions underscore the truism that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, circumstances." *Cafeteria Workers* v. *McElroy* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). "Due process is flexible and calls for such procedural protection as the particular situation demands" *Morrissey* v. *Brewer* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

The Trial Court upon the record before it was aware of the ITT attorneys' responsibility, not only to remove themselves from the case, but to explain the admission in the answer. The defendants acted under color of law by proceedings under the summary judgment procedure 802.08 and 409.203 Wis. Stats. and in violation of the rules of professional responsibility knowing it was not a fair hearing.

In *Re Banks* Or 584 P 2d 284, 1 ALR 4th 1105, (1978) the attorney for the corporation drew an employment agreement between it and an officer. Litigation subsequently developed over the meaning and enforcement of the contract. The corporate attorneys were reprimanded for proceedings to represent the corporation in the dispute stating that when (p. 1117) ". . . a conflict arises between the officer and the corporation about the subject of the representation, the attorney is in an untenable position if he represents either one." (further citing):

> . . . Where two individuals for whom he drew a contract or a mortgage get into a dispute over it, he may not represent either. *Drinker,* Legal Ethics 112-13 (1953).

(see also *Florida Bar.* v. *Teitelman* 261 So. 2d 140, 68 ALR 3rd 959 where the lender's attorneys handled the closing; and also, in *Re Young* (1919) 188 App. Div. 338, 177 NYS 259, *where acting as legal adviser to both lender and borrower* in a loan transaction was held to be professional misconduct; see also 17 ALR 3rd 835, Attorneys — Conflicting Interests.) The rule is cognizable in Wisconsin, *City of Whitewater* v. *Baker,* 99 Wis. 2d 449, 299 N.W. 2d 584 (C.A. 1980).

Due process depends on the facts of each case. The courts have often judicially stated that the "touchstone" of due process in any judicial proceeding is the presence of *fundamental fairness* and that the *pretext* of a hearing cannot be used to conceal a denial of due process. *Burgess* v. *Miller* (D.C. Florida 1980) 492 F.Supp. 1284. In *Murphy* v. *Helena Rubinstein Company* 234 F.Supp. 893 (N.J. 1964) the court stated p. 896:

". . . The demands of due process required by the *Fourteenth Amendment* are such as accord traditional concepts of fair play, substantial justice, and a resolution of the controversy on the merits. These are the very pillars of Anglo-Saxon Laws . . ."

In *Ennis* v. *Ennis,* 88 Wis.2d 82, 97, 276 N.W.2d 341 (1978) the court re-affirmed the duty of the trial court to correct the attorneys wrongful conduct stating:

. . . The Wisconsin Supreme Court has held that *trial court have not only the power but the duty to intervene where the professional misconduct* of an attorney [is involved] *sic* before it affects the substantial rights of the parties. In *Harvey* v. *Harvey,* 202 Wis. 553, 561-62, 231 N.W. 580 (1930), the court recognized that the trial court's power to dismiss an action extended to cases involving conflicts of interest, as well as to cases involving champertous contracts. See also *Blixt* v. *Janowiak,* 177 Wis. 175, 188 N.W. 89 (1922). This power was more recently recognized in *Rode* v. *Sealite Insulation Mfg. Corp.,* 3 Wis.2d 286, 88 N.W. 2d 345 (1958), which upheld the trial court's denial of a motion to dismiss only because the offending attorney had withdrawn from the case and new counsel had been substituted.

Standard Seven of the Code of Judicial Ethics, 36 Wis.2d 252, 257, 153 N.W.2d 873 (1967), states that a judge "should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counselors." In addition, recent federal cases have found an inherent power in courts to enforce the Canons of Ethics by disqualifying attorneys from proceedings with the case in conflict of interest situations. See *Marketti* v. *Fitzsimmons,* 373 F.Supp. 637 (W.D. Wis. 1974); *Koehring Co.* v. *Manitowoc Co., Inc.,* 418 F.Supp. 1133 (E.D. Wis. 1976); *First Wisconsin Mortgage Trust* v. *First Wisconsin Corp.,* 571 F.2d 390 (7th Cir. 1978).

> The interests which warrant and necessitate this power in the trial court are broader than those of the individual litigants. The interests of the public and of the profession are also involved. As counsel for defendant argued before the trial court, this issue goes to "the heart of our attorney system." *Attorneys and judges alike have a responsibility to protect that system from abuse.* (Emphasis added)

United States General, Inc. v. *Schroeder* 400 F.Supp. 713, 718 (E.D. Wis. 1975) recognized that a private attorney could be held liable under section 1983 for improper use of a state judicial form stating:

> . . . In point of fact, it may well be that any intentional and malicious use of a state forum to effect a deprivation of constitutional rights serves to provide a cause of action for the injured party under the provisions of 42 U.S.C. Sec. 1983. See: *Brown* v. *Dunne,* 409 F.2d 341, 344 (7th Cir. 1969), Kerner, J. concurring. This Court does not reach that question here, however.

The attorney for Schroeder proceeded with garnishments, knowing they were invalid. Here, the lender and its attorneys, Whyte and Hirschboeck, proceeded with summary judgment, knowing full and well that such procedure violated the rules of fair play and denied the plaintiffs a fair hearing on the merits.

In *Dennis* v. *Sparks* 101 S.Ct. 183 (1980), defendants obtained an illegal injunction enjoining production under certain oil leases owned by plaintiffs. The complaint was sufficient because it alleged a "corrupt conspiracy" — payoffs to the judge. Petitioners submit that they need only alleged a "civil conspiracy", and have so alleged, to state a Sec. 1983 claim.

SECTION 1983 CONSPIRACY

A civil conspiracy is described under the common law as "a combination of two or more persons to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful." Unlawful is defined in such definition as not to be confined to criminal acts, but also includes all "willful, actionable violations of civil rights." *Mendelson* v. *Blatz Brewing Co.* (1960), 9 Wis. (2d) 487,490,101 N.W. (2d) 805. Under this definition of conspiracy mere knowledge is sufficient to make a judge a co-conspirator where he knowingly proceeds to deny the petitioners due process and equal protection of the laws. 15A C.J.S., Conspiracy, Sec. 2, p. 601-02.

Plaintiffs have alleged that the defendants acted jointly with the circuit court because of an abuse of the summary judgment procedure by the court (allowing the lender's attorney to participate, failure to hold a meaningful hearing, and deciding a disputed factual issue without an evidentiary hearing or trial). The operative facts alleged in the complaint show a conspiracy or joint activity with the court to deprive the plaintiffs of their property without due process of law.

CONCLUSION

The unlawful interference of the ITT attorneys substantially affected the rights of the petitioners under our adversary system to deny them a meaningful hearing. Under the circumstances of this case the complaint has alleged a Sec. 1983 cause of action and this court should grant a writ of certiorari to the Seventh Circuit Court of Appeals for the reasons above stated.

Dated this 10th day of August, 1984.

Respectfully submitted,

LARRY W. RADER
Attorney For Petitioners
P.O. Box 684
Wausau, WI 54401
1-715-845-4278

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM 1984

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Petitioners,

VS.

ITT CONSUMER FINANCE CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LARRY W. RADER
Attorney For Petitioners
P.O. Box 684
Wausau, WI 54401
1-715-845-4278

INDEX TO APPENDIX

3a Court of Appeals decision of 5/23/84

13a Petitioners' District Court Complaint

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted May 10, 1984*

May 23, 1984

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

No. 83-1675

SCHULIST FARMS, INC., et al.,

Plaintiffs-Appellants,

vs.

ITT CONSUMER FINANCIAL CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 83 C 68

JOHN C. SHABAZ, *Judge*.

---

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See Rule* 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

The plaintiffs in this case, the Schulists,[1] filed suit against the defendants[2] alleging that the defendants, acting under color of state law, deprived the plaintiffs of their property without due process of law. The complaint was filed pursuant to 42 U.S.C. § 1983 and subject matter jurisdiction was asserted under 28 U.S.C. § 1343. The complaint also asserted two pendent state claims charging that the defendants committed fraud in procurring a state court judgment against the Schulists, and that the defendants' conduct in that suit was an abuse of process. The district court dismissed the complaint for failure to state a claim under 42 U.S.C. § 1983 for lack of any state action. The Schulists appeal the dismissal of the complaint.

I.

In order to understand the Schulists theory of the case, a brief recitation of the history of the relationship between plaintiffs and defendants is necessary. The defendant, Thorp Finance Corporation (an adopted name for Aetna Finance Company, which in turn is a subsidiary of defendant, International Telephone and Telegraph Consumer Financial Corporation), loaned the plaintiff 250,000 dollars. The loan was secured both by a real estate mortgage and by a personal property security agreement. The Schulists did not retain their own attorney, but rather used the same firm as Thorp, the defendants, Whyte and Hirschboeck. Attorney Heiser, a member of the firm, performed the legal services on behalf of the firm. The firm billed the Schulists directly

---

[1] The seven plaintiffs will collectively be referred to as the Schulists.

[2] The named defendants are the financial institutions that funded a loan to the Schulists and the attorneys who represented both the institutions and the Schulists.

for its services. In a letter to the Schulists, the firm indicated that there was a "blanket security agreement" and both Thorp and the plaintiffs assumed and acted as if the agreement covered the growing potato crops on the land.

Apparently, the Schulists were unable to meet the loan payments and, in February 1980, Thorp initiated foreclosure proceedings against the Schulists. The Schulists, meanwhile, planted a potato crop on the land in the spring of 1980. Pursuant to a foreclosure judgment, a personal property auction and a Sheriff's sale were held. Thorp purchased the land at the Sheriff's sale, but did not sell the potato crop. The crop rotted in the field. The Schulists challenged the foreclosure proceeding on appeal and the judgment was reversed.

The Schulists filed suit in state court against Thorp requesting damages for the loss of the potato crop. The damages suit was consolidated with the remanded foreclosure action. In this action, Thorp continued to be represented by the defendant firm, Whyte and Hirschboeck. Thorp, in its answer, admitted that they had a security interest in the growing crops. Thereafter, however, Thorp moved for summary judgment arguing that the security agreement did not cover the growing crops, due to a lack of proper legal description in the loan documents. Plaintiffs filed a motion opposing summary judgment, along with counter-affidavits, and deposition testimony by Thorp officials contradicting Thorp's motion for summary judgment.

The state court granted summary judgment to Thorp. The Schulists contend that the state court judge granted the defendants' motion for summary judgment despite the fact that the Schulists had submitted counter-affidavits, and despite the allegedly clear conflict of interest on the part of Whyte and Hirshboeck reflected in the record.

The record in this court is not clear as to whether plaintiff's appealed from the grant of summary judgment. The plaintiffs, subsequent to the grant of summary judgment, commenced suit in federal district court charging defendants with fraud, abuse of process and with the violation of plaintiffs' constitutional rights. The district court dismissed the suit for failure to state a claim for which relief could be granted pursuant to 42 U.S.C. § 1983. Plaintiffs appeal.

II.

The sole issue to be determined on appeal is whether the third count of plaintiffs' second amended complaint states a claim for which relief can be granted pursuant to 42 U.S.C. § 1983.[3] The third count is plaintiffs' only

---

[3] Count III of the second amended complaint reasserts the fraud and abuse of process allegations and adds the following paragraphs:

> 27. Realleges paragraphs 1-25 above. That the above defendants jointly and separately, acting under color of law, did wrongfully deprive the plaintiffs of their rights and property and privileges secured by the constitution and laws under 42 U.S.C. Sec. 1983, for which they are entitled to recover compensatory and punitive damages as demanded herein.
>
> 28. That the defendants willfully acted jointly with the Circuit Court of Portage County to deprive the plaintiffs of their property without due process of law. That the circuit court of Portage County, Wisconsin, upon the record and information before it, willfully entered summary judgment pursuant to an unconstitutional procedure, under color of state law, depriving plaintiffs of their property ($240,000 potato crop) without due process of law in that among other conduct, the court (1) exceeded or abused its authority by utilizing the summary judgment procedure where a disputed issue of fact existed,

asserted federal cause of action, the other two counts being state tort actions. Without commenting on the merits of plaintiffs' first two counts, the state tort actions, we note that plaintiff must state a federal cause of action in order to remain in federal court. The federal court lacks jurisdiction over the state court claims standing alone.

In reviewing the grant of a motion to dismiss, this court must take all well-pleaded factual allegations as true. *Reichenberger* v. *Pritchard,* 660 F.2d 280 (7th Cir. 1981); *Brucar* v. *Rubin,* 638 F.2d 987 (7th Cir. 1980). Taking plaintiffs' factual allegations as true, we must affirm the granting of a motion to dismiss only if it is clear that the plaintiff can prove no set of facts entitling him to relief. *Corley* v. *Gibson,* 355 U.S. 41 (1957); *Reichenberger* v. *Pritchard,* 660 F.2d at 282.

In determining whether plaintiffs can prove any set of facts entitling them to relief, we must analyze the elements of a § 1983 cause of action, for even if plaintiffs can prove all the allegations in their complaint they still might not prove a § 1983 violation. In order to recover under § 1983 a plaintiff must demonstrate that actions of the defendants have deprived plaintiffs of a right secured by the constitution or laws of the United States and that the defendants did so acting under color of state law. *Flagg Brothers, Inc.* v. *Brooks,* 436 U.S. 149 (1978).

Plaintiffs complain of a deprivation of their property without due process of law in violation of the Fourteenth

---

[3] (Continued)

(2) allowed the lender's attorney, as drafter of the disputed document, to file an answer admitting plaintiffs' claim, but nevertheless, proceeding on said attorney's legal memorandum and conflict of interest therein, so as the deny plaintiffs a meaningful hearing, and (3) denied plaintiffs their right to a jury trial.

Amendment. The Fourteenth Amendment is only violated by action that can be characterized as state action. Although the "state action" requirement and "under color of state law" requirement are separate inquiries in a determination of whether a given complaint states a cause of action under 42 U.S.C. § 1983, it is clear that under the constitutional violation asserted by plaintiffs in the instant case, the Fourteenth Amendment "state action" requirement and the "under color of state law" requirement are idential. *Lugar* v. *Edmonson Oil Co., Inc.,* 102 S. Ct. 2744, 2753 (1982). The question presented, therefore, is whether any actions of the defendants can be considered "state action"[4] for the purpose of supporting a § 1983 claim.

To support a finding of "state action" the conduct allegedly causing the constitutional deprivation must be "fairly attributable" to the state. The determination of whether certain conduct is "fairly attributable" to the state requires a two-step analysis. The deprivation, of which a plaintiff complains, "must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible." *Lugar,* 102 S. Ct. at 2754. The second step requires that the

---

[4] The Supreme Court, in *Lugar,* noted that if the challenged activity constitutes state action the conduct also satisfies the "under color of state law" requirement. "Under color of state law" requires a separate inquiry in circumstances where the constitutional violation of which a party complains does not contain a "state action" requirement. *Lugar,* 102 S. Ct. at 2753 n.18. We need only limit our inquiry to whether the conduct challenged in the instant case constituted "state action." If we find, as we do, that it is not state action, the first element of a § 1983 cause of action is not satisfied and plaintiffs' complaint would not state a claim for which relief could be granted.

> party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

Id. at 2754. We must look to the complaint to determine whether defendants' actions satisfy these two tests.

The deprivation of property in this case, the loss of the potato crop, was caused by an entry of summary judgment against plaintiffs. Summary judgment was entered against plaintiffs by a state court judge. This, in plaintiffs' theory of the case, is the state action. Assuming, for the sake of discussion, that this deprivation was "caused by the exercise of some right or privilege created by the state,"[5] we must determine whether the defendants, who are private parties, can be characterized as state actors. Private parties jointly acting with state officials in prohibited activity can be characterized as state actors. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970). The complaint in the instant case alleges that the defendants willfully acted jointly with the state court to deprive plaintiffs of their property. In their appellate brief, plaintiffs assert that this is an allegation of conspiracy. A close reading of the brief complaint, however, leads to a contrary conclusion. The plaintiffs complain that the judge exceeded his authority by granting summary judgment despite the fact that a disputed issue of material fact existed. This allegation amounts to no more than a claim of error or irregu-

---

[5] We do not find that imposition of summary judgment after notice and hearing constitutes a constitutional deprivation, in this case deprivation without due process of law. Generally, the cases wherein a constitutional deprivation is found have been prejudgment, *ex parte* attachment of property. In the instant case, the plaintiffs are challenging a taking of property after notice and hearing. See text p. 10, *infra*.

larity in a state court proceeding. This allegation is not cognizable in a § 1983 claim. *Brown* v. *Dunne,* 409 F.2d 341 (7th Cir. 1969). Under the circumstances of this case, the federal court does not provide a forum for review of state court trial errors.

Plaintiffs' next asserts that joint participation by the court and defendants was demonstrated when the state court allowed the defendant attorneys to represent the credit companies despite the clear conflict of interest, thereby denying plaintiffs a fair hearing. The entry of judgment by the state court judge despite the fact that he was aware that a conflict of interest existed, amounts again to a claim of error or irregularity in the state court proceedings. Mere knowledge does not convert the state court judge into a conspirator. There is no allegation here of bribery or other activity indicating that there was an agreement between the state court judge and the defendants herein to procure this particular judgment. *Cf. Dennis* v. *Sparks,* 449 U.S. 24 (1980). Instead, the complaint describes a situation where the defendants herein, allegedly acting improperly, resorted to the courts and were successful even though the court knew of the impropriety. There is no allegation of conspiratorial conduct between the judge and the defendants. The complaint fails to allege sufficiently joint action on the part of the judge and the defendants to state a claim under § 1983.

Plaintiffs lastly contend that the defendants and the judge acted jointly in depriving the plaintiffs of a jury trial. The state court judge granted summary judgment in favor of the defendants. The grant of a motion for summary judgment where there is no genuine issue of material fact is not a violation of the right to a jury trial. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2714 (1983); *Shore* v. *Parklane Hosiery Co., Inc.,* 565 F.2d 815 (2d Cir. 1977),*aff'd* 439 U.S. 322; *Oglesby* v. *Terminal Transport Co., Inc.,* 543 F.2d 1111, 1113 (5th Cir. 1977); *United States* v. *Stangland,* 242

F.2d 843 (7th Cir. 1957). The complaint does not allege joint action by the judge and the defendants to obtain judgment against the plaintiffs. In short, the complaint falls far short of alleging any facts that specifically support a conspiracy. The complaint itself alleges joint action, but describes improper action by the attorneys and separate erroneous action by the judge. The complaint states only conclusory and vague allegations of conspiracy and, as such, fails to state a claim of conspiracy. *See Hansen* v. *Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975). Without any type of joint action or conspiracy with the state court judge, the defendants cannot fairly be said to be state actors.

A private attorney representing private litigants in a state court action does not act "under color of law" *Hansen* v. *Ahlgrimm*, 520 F.2d at 770; and, therefore the attorney cannot be said to be a state actor. *See also Lindley* v. *Amoco Production Co.*, 639 F.2d 671 (10th Cir. 1981). The attorneys in the instant case, even assuming they acted tortiously and in violation of their professional responsibilities, are not state actors.[6]

There remains one other method by which the private litigants may become state actors for the purpose of stating a claim pursuant to § 1983. Where a litigant invokes a state procedure which itself is challenged as unconstitutional, a litigant may be found to be acting under color of state law for purposes of finding the required state action in a Fourteenth Amendment claim. *Lugar* v.

---

[6] We do not imply by this decision that we condone the defendants actions in this case, if the allegations are indeed true. We merely find that the complaint fails to state a claim under § 1983; therefore we have no jurisdiction to consider plaintiffs' other claims.

Edmondson Oil Company, Inc., 102 S. Ct. at 2756.[7] Plaintiffs allege that the statute itself was unconstitutional yet provide nothing in support of that allegation. The complaint itself does not allege that the summary judgment procedure itself is unconstitutional. The complaint alleges no more than a misuse or abuse of the statute, and, as such, fails to state a cognizable § 1983 claim. *Lugar*, 102 S. Ct. at 2757.

III.

Plaintiffs' complaint fails to state a claim for which relief can be granted pursuant to 42 U.S.C. § 1983. The conclusory allegations of joint action with the state court judge and the conclusory constitutional challenge to the state summary judgment procedure fail to convince us that plaintiffs' complaint falls within the ambit of a § 1983 claim. The district court's dismissal of plaintiffs' complaint is affirmed.

---

[7] The *Lugar* case involved an attack on the constitutionality of *ex parte*, prejudgment attachment procedure. The Supreme Court found state action had been sufficiently pleaded, under the specific circumstances of the case, where the plaintiffs challenged the invocation by defendants of an unconstitutional statute. The courts have strictly scrutinized these *ex parte*, prejudgment attachment procedures because of the serious due process implications. *See Mitchell* v. *W.T. Grant*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance*, 395 U.S. 337 (1969). No such *ex parte* action was taken here and there is no allegation that the procedures used deprived plaintiffs' of notice and opportunity to respond.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Plaintiffs,

-vs-

ITT CONSUMER FINANCIAL CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Defendants.

Case No. 83-C-685

AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL

COMPLAINT FOR DAMAGES

Plaintiffs for their claim for relief against defendants state:

THIS COURT HAS JURISDICTION OVER THE CAUSES OF ACTION ALLEGED HEREIN PURSUANT TO 28 USCA Sec. 1331, 1332, and 1343.

1. The plaintiff, Schulist Farms, Inc., is a Wisconsin corporation with a principal place of business at Route 1, Custer, Wisconsin, and was formally engaged in the business of operating a dairy and potato farm in Portage County, which had been in the Schulist family for over 100 years.

2. That the plaintiff, Schulist Enterprises, is a partnership with a principal place of business at Route 1, Custer, Portage County, Wisconsin, and was engaged in the business of wholesaling potatos.

3. That the plaintiff, Thomas H. Schulist, is an adult residing at Route 1, Custer, Portage County, Wisconsin and is by occupation a farmer; that the plaintiff, Rosalie Schulist, is a wife of Thomas H. Schulist and resides at Route 1, Custer, Portage County, Wisconsin and is by occupation a farm wife.

4. That the plaintiff, David A. Schulist, is an adult residing at Route 1, Custer, Portage County, Wisconsin and is by occupation a farmer; that the plaintiff, Muriel Schulist, is an adult residing at Route 1, Custer, Portage County, Wisconsin, and is the wife of David A. Schulist, and is by occupation a farm housewife.

5. That the plaintiff, Paul F. Schulist, is an adult residing at Route 1, Custer, Wisconsin, and is by occupation a dairy and potato farmer.

DEFENDANTS

6. ITT Consumer Financial Corporation (ITTCFC), a division of Internation Telephone and Telegraph, a Delaware corporation, has its headquarters at the Shelard office building complex located at 300 South County Line Road 18, Minneapolis, Minnesota, whose business consists, of financial management including providing services to Aetna Finance.

7. Aetna Finance Company (Aetna), a Delaware corporation, is engaged in consumer and business financing, at 300 South County Line Road 18, Minneapolis, Minnesota and is licensed to transaction business in the State of Wisconsin, and is also a subsidiary of ITT Financial Services, under the adopted name of Thorp Finance Corporation, which has loan offices in Wisconsin, including an office at Stevens Point, Wisconsin.

8. Whyte and Hirschboeck, S.C., is a professional service corporation of Wisconsin attorneys of which Edward J. Heiser, Jr. is a member attorney with offices at 2100 Marine Plaza, Milwaukee, Wisconsin; that at all time ma-

terial hereto said defendant attorneys were counsel for the above named other defendants as hereinafter alleged:

FIRST CAUSE OF ACTION

(Fraud in the Procurement of Obtaining Order and Judgment Dismissing Plaintiffs' Complaint for Loss of $300,000 1980 Potato Crop.)

9. In 1980 Thorp foreclosed its real estate mortgage and personal property security against Schulists. (Case No. 80-CV-69, Cir.Ct.Portage County, Wisconsin) Pursuant to said foreclosure proceedings, Thorp sold the Schulists' personal property at auction on 10/10/80 and the secured real estate at sheriff's sale on 10/13/80, at which sale Thorp purchased the real estate on which was growing the plaintiffs' matured 100 acre potato crop. Said sale was confirmed on 10/31/80 and a deed delivered to Thorp for said property. Thorp did not disclose to the court the fact that a potato crop was growing on said property or account for its value in its bid price. The potato crop rotted in the ground at a net loss to Schulists of $240,000. On October 27, 1981, the Wisconsin Court of Appeals reversed and remanded the confirmation of 10/31/80 pursuant to which the trial court by order dated 12/14/81 vacated the sale to Thorp and consolidated the foreclosure action with plaintiffs' pending action for damages initiated in April 1981 — Case No. 81-CV-141 against defendants ITTCFC and Aetna (Thorp).

10. On July 27, 1981, plaintiffs filed an Amended Complaint in 81-CV-141, Circuit Court, Portage County, Wisconsin alleging seven (7) causes of action against the defendants, ITT, Aetna (Thorp) therein, relating to the improper foreclosure and sale of their farm and secured personal property including the loss of their $300,000 secured 1980 potato crop.

11. Paragraph 20 of said Amended Complaint reads as follows:

> On June 12, 1979, Thorp Finance Corporation of Stevens Point, Wisconsin, a subsidiary of ITT Financial Services, utilizing the tradename, Thorp, loaned $250,000 to Schulist Farms, Inc., which was co-signed by the other named plaintiffs herein. *The note was secured by* personal farm machinery, cattle, *growing crops,* irrigation and potato farm harvesting equipment, as well as a first mortgage on a 118 acre potato farm with irrigation systems (known as the Almond farm) and a second mortgage on approximately 545 acres of other farm land and buildings, including the home farm on which there are the separate residences of the plaintiff and the parents of David, Thomas and Paul Schulist. (Emphasis added)

12.. Pursuant to a partial settlement, four (4) causes of action were dismissed, and the court entered an order dated 12/14/81 dismissing the defendants' motion to dismiss, directing plaintiffs to file a clarifying second amended complaint realleging the remaining three (3) causes of action, and further directing the defendants to answer.

13. Paragraph 9 of the plaintiffs' Second Complaint reads:

> On June 12, 1979, Thorp Finance Corporation of Stevens Point, Wisconsin, a subsidiary of ITT Financial Services, utilizing the tradename Thorp, loaned $250,000 to Schulist Farms, Inc. which was co-signed by the other named plaintiffs herein. *The note was secured by* personal farm machinery, cattle, *growing crops,* irrigation and potato harvesting equipment, as well as a first mortgage on parcel 1 and a second mortgage on parcel 2, as described in the judgment of 5/30/80, hereinafter described. (Emphasis added)

14. On 1/4/82 the defendants, by their attorneys, Whyte and Hirschboeck, S.C., per Edward J. Heiser, answered

said complaint, inter alia, *admitting* the allegations of said paragraph 9.

15. Notwithstanding said admission of a security on the growing crops Thorp filed a motion on February 4, 1982 for summary judgment based upon "the second amended complaint and other files of this case," *and upon the legal memorandum prepared by Whyte and Hirschboeck,* to dismiss the claim of said complaint which in any way involves responsibility (of Thorp) for the crops planted by plaintiff in the spring of 1980. The basis of said motion was that the security agreement lacked a real estate description and Thorp had no enforceable security under Wis. Stat. 409.203(1).

16. Thereafter the plaintiffs filed counter-affidavits alleging that both parties, Schulists and Thorp, intended that the note and security instruments relating to the loan of June 12, 1979 granted Thorp a security on the crops, and that the security agreement (while not in the body of the instrument) had a legal description attached because of its length; in addition the note on its face specifically shows crops as security, and the security agreement itself has farm products checked as security which under Wisconsin Stat. 409.109(3) includes crops or products of crops.

17. That Verlyn Schultz, the Thorp manager who was acquainted and serviced the Schulists loan from its inception, testified under oath on 6/11/81 that a legal description was attached to the security agreement stating:

> p. 47 (referring to the security agreement)
>
> Q. And below typed in detail of the property that is secured, there is a printed portion of the security agreement which reads: "including all increases thereof and all property thereto, and all substitutions and replacements and proceeds thereof, together with all of the interest of the undersigned and all farm supplies and all crops of every kind growing

or to be grown or harvested on the land described below, and in any and all products of crops and livestock in any period," is that right?

A. YES

Q. Now, attached to that security agreement was not only an itemization of particular pieces of property such as irrigation equipment, farm machinery, but also is a description of the real estate?

A. YES

Then at p. 98:

Q. I believe, Mr. Schultz, I earlier inquired as to the real estate description which was attached to the security agreement being designated a schedule "AA"?

A. YES

That in addition, said Thorp loan cards (all eight of them) covering the Schulists loan had separately typed thereon that the loan was secured by crops.

18. That notwithstanding the above, said defendants arranged for the filing of an affidavit by Verlyn Schultz dated March 1982 in which he denied that the real estate description was attached to the security agreement or that Thorp intended to take a security in the growing crops.

19. That pursuant to a letter dated June 1, 1979, attached Exhibit A, Whyte and Hirschboeck, S.C. and Edward J. Heiser, Jr., drafted the loan closing documents and attended the loan closing on June 12, 1979 giving advice to both Thorp and Schulists regarding the legal effect of said closing documents. That Schulists relied on the representations and advice given at said loan closing and thereafter, that their 1980 potato crop was secured by Thorp.

20. That Schulists were not represented, or were advised to have separate counsel, at said closing, BUT IN FACT, Whyte and Hirschboeck, S.C., billed Schulists $1,000.00 (which they paid) per the attached Exhibit B.

That on June 22, 1979, Whyte and Hirschboeck advised Thorp by letter that it had a "blanket security" agreement covering Schulists.

21. Notwithstanding that the defendants knew or had reason to know that the intent was to secure the growing crops, said defendants, upon information and belief, concealed their errors (negligence) relating to the drafting of said documents, and to save themselves harmless from liability, did cause deceptive and false documents to be filed with the court included the Schultz affidavit of March 1982, and the self-serving legal memorandum filed by Whyte and Hirschboeck on behalf of said defendants.

22. That said attorneys Whyte and Hirschboeck and Edward J. Heiser, Jr. have appeared and defended said crop issue in the Portage County Circuit Court and the Wisconsin Court of Appeals, when they knew or had reason to know that said representation was illegal and improper by reason of their having acted in a dual capacity giving advice to both Schulists and Thorp and drafter of the loan closing documents. That thier participation, upon information and belief, was done to cover up and conceal and to save themselves and their clients from liability for the loss of the $300,000 1980 potato crop, and tainted the entire proceeding with fraud, particularly where Whyte and Hirschboeck drafted the loan documents, drafted the answer admitting the security on growing crops, and then failed to file an affidavit by Edward J. Heiser, the drafter of the instrument denying the Schulists claim of coverage.

23. The defendants knew or should have known that said conduct was reprehensible to the legal rights of the plaintiffs in that they had knowledge that Thorp and Schultz at the confirmation hearing, had failed to report to the court a $140,000 offer on real estate which Thorp purchased at sheriff's sale for $129,000, failed to report $2,066.26 in milk check assignments received by Thorp

on the Schulists account, failed to report proper interest and insurance credit, and failed to report or account for missing personal property sale proceeds, including five (5) missing cows, all of which casts suspicion and untrustworthiness on the Schultz affidavit and the conduct of the defendants relating thereto.

24. That the above conduct has caused Schulists substantial legal fees and expense, interest and expenses exceeding $15,000, the net loss of the $240,000 due them for the 1980 potato crop by virtue of the trial court having granted Thorp's motion for summary judgment dismissing the plaintiffs' claim for the loss of the 1980 potato crop because the legal description was omitted.

25. The acts above alleged on the part of the defendants were done intentionally, wantonly, and/or in reckless disregard of the plaintiffs' rights and to illegally deprive them of their property or the value thereof entitling them to punitive damages in the amount of $5,000,000.

SECOND CAUSE OF ACTION

ABUSE OF PROCESS

26. Realleges paragraphs 1-25 above and state that said conduct constitutes a cause of action directly or alternatively in abuse of process against said defendants.

THIRD CAUSE OF ACTION

VIOLATION OF CIVIL RIGHTS

27. Realleges paragraphs 1-25 above. That the above defendants jointly and separately, acting under color of law, did wrongfully deprive the plaintiffs of their rights and property and privileges secured by the constitution and laws under 42 U.S.C. Sec. 1983, for which they are entitled to recover compensatory and punitive damages as demanded herein.

WHEREFORE plaintiffs demand judgment against the defendants jointly and separately in the amount of $300,000 actual damages, $5,000,000 punitive damages, together with interest, costs and attorney fees of this action.

Dated this 14th day of February, 1983.

PLAINTIFFS DEMAND JURY TRIAL.

LARRY W. RADER
Attorney for Plaintiffs
P.O. Box 684
221 Scott Street
Wausau, Wisconsin 54401
715-845-4278

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Plaintiffs,

vs.

ITT CONSUMER FINANCIAL CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Defendants.

PLAINTIFFS' MOTION TO AMEND COMPLAINT

Case No. 83-C-68-S

Plaintiffs move to amend the third cause of action of their Amended Complaint by adding the following paragraph 28.

28. That the defendants willfully acted jointly with the Circuit Court of Portage County to deprive the plaintiffs of their property without due process of law. That the Circuit Court of Portage County, Wisconsin, upon the record and information before it, willfully entered summary judgment pursuant to an unconstitutional procedure, under color of state law, depriving plaintiffs of their property ($240,000 potato crop) without due process of law in that among other conduct, the court (1) exceeded or abused its authority by utilizing the summary judgment procedure where a disputed issue of fact existed, (2) allowed the lender's attorney, as drafter of the disputed document to file an answer admitting plaintiffs' claim, but

nevertheless, proceeding on said attorney's legal memorandum and conflict of interest therein, so as to deny plaintiffs a meaningful hearing, and (3) denied plaintiffs their right to a jury trial.

Dated this 21st day of March, 1983.

/s/ LARRY W. RADER
Attorney for Plaintiffs